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IN THE

Supreme Court of the United States

LARRY BEGAY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" BECAUSE IT IS NOT A VIOLENT, ACTIVE PROPERTY CRIME TYPICAL OF CAREER CRIMINALS THAT BECOMES MORE DANGEROUS WHEN COMMITTED WITH A FIREARM.

The government's proffered "all crimes" interpretation of the "otherwise" clause extracts the word "otherwise" from the rest of the Armed Career Criminal Act ("ACCA") and exalts that word's dictionary definition above: the language and structure of 18 U.S.C. § 924(e)(2)(B)(ii) and the ACCA as a whole; the term the "otherwise" clause defines; the purpose of the ACCA; well-established canons of statutory construction; and the ACCA's legislative history. The government's position that the "otherwise" clause includes any crime of whatever kind "that presents a serious potential risk of physical injury to another" renders superfluous Congress's detailed delineation of what prior offenses trigger the drastic increase in punishment the ACCA mandates. This Court should reject that untenable position and adopt the interpretation that gives meaning to every word of the ACCA and fulfills Congress's objectives in designing the ACCA. The "otherwise" clause must be restricted to violent, active property crimes typical of career criminals that become more dangerous when committed with firearms.

A. The government's reading of the "otherwise" clause ignores its context and conflicts with this Court's precedent.

1. "[I]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006). Accordingly, statutory interpretation must begin with "the language of the governing statute, guided not by a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993) (internal quotations omitted).

The government takes the word "otherwise" entirely out of context, ascribes to it a dictionary meaning, declares that meaning to be plain, and effectively disregards every other aspect of the ACCA. Response Brief ("Resp. Br.") 25-34. But, whether statutory language is plain or ambiguous depends on the context. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 n. 6 (1988) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.)). An examination of the "otherwise" clause in light of the entire ACCA refutes the government's "all crimes" interpretation and strongly supports Larry Begay's "similar crimes" interpretation.

2. The term the "otherwise" clause defines—"violent felony"—limits the scope of that clause to

offenses that are violent and active. The government does not disagree with then-Judge Stephen Breyer's assessment in *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992), that the phrase "violent felony" "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence" than drunk driving. Resp. Br. 29 n. 17. Nonetheless, the government contends the "otherwise" clause "cover[s] a broader range of conduct than the term itself might otherwise 'call to mind.'" *Id.* (quoting *Doe*, 960 F.2d at 225). But, the "otherwise" clause must be read in light of the term it defines and harmonized with it, not ignored, as the government's contention does.

For example, in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court interpreted the residual clause of the definition of "crime of violence" under 18 U.S.C. § 16(b) in light of the meaning of the term "crime of violence." *Id.* at 11. "[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.* Similarly, in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), this Court rejected the government's argument in favor of broadening the definition of drug trafficking to include mere possession in part because its argument was "incoheren[t] with any commonsense conception of 'illicit trafficking,' the term ultimately being defined." *Id.* at 629-30.

The government's "all crimes" interpretation conflicts with any commonsense conception of "violent felony." In *Leocal*, this Court found the ordinary meaning of the term "crime of violence," combined with the emphasis of 18 U.S.C. § 16 on the use of physical force, "suggests a category of violent, active crimes that cannot be said naturally to include [driving under the influence] offenses." 543 U.S. at

11. By citing, in support of that conclusion, to then-Judge Breyer's observations in *Doe* regarding the term "violent felony," *id.*, this Court likened "crime of violence" to "violent felony." Thus, the term "violent felony" also "suggests a category of violent, active crimes that cannot be said naturally to include [driving under the influence] offenses." *Id.*

Mr. Begay is not attempting to read into the ACCA an intentional use-of-force requirement that the ACCA's text does not justify, as the government claims, Resp. Br. 29-30. Mr. Begay is appropriately interpreting the "otherwise" clause in light of its context, which includes the term that clause describes. This Court's distinction in *Leocal*, to which the government refers, *id.* at 30, between the "use of force" language in § 16(b) and the "serious potential risk of physical injury" language that defines "crime of violence" under USSG § 4B1.2(a)(2), *Leocal*, 543 U.S. at 10 n. 7, does not undermine that interpretative method. The "otherwise" clause of the ACCA—which, unlike the "serious potential risk" phrase in the Guidelines, Joint Appendix ("JA") 88-89, 106 n. 2; *see* USSG § 4B1.2, cmt. (n. 1), is linked by the word "otherwise" to the preceding enumerated violent, active offenses—must be read with the understanding that it defines a term that connotes a violent, active crime.

3. The purpose of § 924(e)(2)(B)(ii) manifests the congressional intent to confine the scope of the "otherwise" clause to offenses career criminals typically commit that are more dangerous when committed with firearms. The government proposes a purpose of § 924(e)(2)(B)(ii)—to deter those who "have demonstrated that they have little regard for the safety and well being of others"—that has no basis in the text. Resp. Br. 33-34. In *Taylor v.*

United States, 495 U.S. 575 (1990), this Court already explained the purpose of § 924(e)(2)(B)(ii) is to deter from possessing firearms "career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.* at 587-88.

The enactment of 18 U.S.C. § 924(c) does not contradict that conclusion, as the government asserts. Resp. Br. 33-34. Section 924(c) addresses the dangerousness of certain current offenses when committed with a gun. Section 924(e) addresses the dangerousness of certain possible future offenses when committed with a gun by those who committed those kinds of offenses in the past. The two provisions serve related, but different, purposes. The purpose of § 924(c) certainly does not interfere with, contradict, or render redundant the purpose this Court accorded to § 924(e) in *Taylor*.

As Judge McConnell observed, if the purpose of § 924(e) were as broad as the government claims, its enhanced penalty would not be limited as it is to those who unlawfully possess firearms. JA 118. The purpose of the ACCA, and in particular § 924(e)(2)(B)(ii), is, thus, precisely what this Court declared it is in *Taylor*—to deter from possessing firearms those who have committed offenses typically committed by career criminals that are more dangerous when committed with firearms. 495 U.S. at 587-88. The "otherwise" clause should be interpreted accordingly. *See id.* at 581, 587-88, 590 ("[t]hese observations about the purpose and general approach of the enhancement provision enable us to narrow the range of possible meanings of the term 'burglary'").

4. The two-part structure of § 924(e)(2)(B) strongly points to the inclusion of only property offenses in the "otherwise" clause of subsection (ii). With respect to that point, the government mistakenly assumes Mr. Begay is simply relying on the notion that the "otherwise" clause offenses must be similar to the enumerated offenses. Resp. Br. 31.

Mr. Begay's point is that § 924(e)(2)(B) is divided into one subsection that concerns crimes against people and another subsection that concerns crimes against property that could result in injury to a person. This Court's analysis of the legislative history in *Taylor* confirms this description. 495 U.S. at 584-85, 589, 597; *see also James v. United States*, 127 S. Ct. 1586, 1592 (2007) (referring to the enumerated crimes as "not technically against the person"). Subsection (i) describes offenses with elements related to "physical force against the person of another." Subsection (ii) specifically enumerates four offenses, all of which are property offenses, followed by the "otherwise" clause. This structure argues for restricting the "otherwise" clause solely to property offenses. *See United States v. McCall*, 439 F.3d 967, 979 (8th Cir. 2006) (en banc) (Lay, J., joined by Wollman and Bye, JJ., dissenting).

5. The title of the Armed Career Criminal Act further supports Mr. Begay's position that the "otherwise" clause includes only violent, active offenses typically committed by career criminals that become more dangerous when committed with firearms. Pet'r Br. 17-18. The government correctly states that the title of legislation is helpful as an interpretative aid only when doubt exists as to the meaning of a statute. Resp. Br. 31-32. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). But, as demonstrated *supra* and *infra*, an

initial examination of the "otherwise" clause in context—an interpretative process that must be engaged in before determining the plain or ambiguous nature of a statutory phrase, *see Brown*, 513 U.S. at 118—supports Mr. Begay's position, not the government's.

6. The term "violent felony," and the title, purpose, and structure of the ACCA, inform the interpretation of the language of § 924(e)(2)(B)(ii)—"is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *See Dolan*, 546 U.S. at 486 (interpreting "a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute"). Contrary to the import of those relevant features of the ACCA, the government contends the word "otherwise" takes on a dictionary meaning, i.e., "in a different manner." Resp. Br. 25. There are at least four glaring flaws in that interpretation.

First, if "otherwise" means "in a different manner," the "otherwise" clause only applies when the risk is created in a manner different from how the risk is created when the enumerated crimes are committed. That reading would contradict *James*. In *James*, this Court held that the "otherwise" clause included attempted burglary because the commission of that offense creates the *same* kind of risk of physical injury as the enumerated offense of burglary does. 127 S. Ct. at 1594-96.

Second, interpreting the word "otherwise" to mean "in any way," as the government apparently does, Resp. Br. 26, renders the rest of the ACCA superfluous, violating the well-established principle that every word of a statute must be given meaning if at all possible. *See Leocal*, 543 U.S. at 12. According

"violent felony" status to every crime that creates a serious potential risk of physical injury would make unnecessary Congress's references to "serious drug offenses," § 924(e)(2)(A), and offenses that involve the use of physical force against a person. § 924(e)(2)(B)(i).

Indeed, the government's interpretation could sweep into the ACCA's realm offenses that other portions of the ACCA impliedly exclude. For example, it could include as a "violent felony" a drug offense that carries a maximum of less than ten years, even though § 924(e)(2)(A)(i) excludes that offense from the "serious drug offense" definition. As another example, the government's definition could include as a "violent felony" an offense against the person of another, such as involuntary manslaughter, that requires a lesser intentionality than the use of force required as an element under § 924(e)(2)(B)(i). Congress would hardly go to all the trouble of carefully delineating what predicate offenses trigger an ACCA enhancement and then eviscerate all its work with one phrase. *See United States v. Golden*, 466 F.3d 612, 617 (7th Cir. 2006) (Williams, J., dissenting) ("It seems unlikely . . . Congress would have gone to the trouble of delimiting the reach of section 924 to 'violent felonies' if it intended to subject [failure to return to jail] to enhanced punishment for recidivism."), *petition for cert. filed*, (U.S. Apr. 9, 2007) (No. 06-10751).

The government's interpretation also treats the enumerated offenses as meaningless. The word "otherwise" establishes a "substantive connection" between the clause that follows it and the enumerated offenses that precede it. JA 110 (McConnell, J., dissenting). The "all crimes" interpretation fails to tie the "otherwise" clause to the

enumerated offenses. Instead, it treats the "otherwise" clause as though Congress had set it out in a third subsection. The government contends Congress made the enumerated offenses a part of § 924(e)(2)(B)(ii) only to ensure those offenses were considered "violent felonies." Resp. Br. 38. But, that supposition fails to explain the word "otherwise." The word "or" alone, or enacting a third subsection, would serve the proffered purpose. JA 110-11 (McConnell, J., dissenting); *McCall*, 439 F.3d at 977 (Lay, J., joined by Wollman and Bye, JJ., dissenting).

In relying on cases interpreting the term "crime of violence" in the career offender sentencing guidelines, Resp. Br. 13 n. 5, the government again ignores the importance of the link in § 924(e)(2)(B)(ii) between the "otherwise" clause and the enumerated offenses. Those guidelines de-link the phrase "presented a serious potential risk of physical injury to another" from the enumerated offenses. USSG § 4B1.2, cmt. (n. 1). The Tenth Circuit panel unanimously agreed the de-linking was a significant feature distinguishing the career offender guidelines from § 924(e)(2)(B)(ii) that provided the basis for a broader interpretation. JA 88-89, 106 n. 2. The Sentencing Commission itself acknowledges the guideline definition of "crime of violence" is not the same as the ACCA's definition of "violent felony." USSG § 4B1.4, cmt. (n. 1). The government reads the "otherwise" clause as though it were disconnected from the enumerated offenses, as it is in the Guidelines, when, in fact, it is very closely connected.

Third, interpreting the word "otherwise" to mean "in any way" conflicts with the meaning of the term the "otherwise" clause defines—"violent felony"—the title and purpose of the ACCA, and the structure of § 924(e)(2)(B). The government takes one word in the

entire ACCA—"otherwise"—out of its context and uses it to override the import of that context. As noted above, statutory interpretation must be guided by the provisions of the whole statute and its object and policy. *John Hancock Mut. Life Ins. Co.*, 510 U.S. at 94-95.

Fourth, this Court has often interpreted the word "otherwise" to express similarity. In *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979), and *United States v. Mississippi*, 380 U.S. 128, 136-38 (1965), this Court interpreted the phrase "otherwise qualified" to mean that the individuals in question have the same valid qualifications as others. The government's spin on these cases that they interpret "otherwise" to mean "in other respects," Resp. Br. 25-26 n. 16, is at best incomplete. This Court at the very least interpreted "otherwise" to mean "in the *same* other respects."

In *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U.S. 290 (1902) this Court analogized the word "otherwise" in the phrase "by certiorari or otherwise" to the "*ejusdem generis*" principle. *Id.* at 295 ("The latter words ['or otherwise'] add nothing to our power, for if some other order or writ might be resorted to it would be *ejusdem generis* with certiorari."). Similarly, in *Board of Educ. v. Harris*, 444 U.S. 130 (1979), this Court applied the principles of *ejusdem generis* and construed the word "otherwise" to mean "in a similar manner" or "similarly." *Id.* at 138-150; *id.* at 153 (Stewart, J., dissenting); *see also Pollgreen v. Morris*, 911 F.2d 527, 532-33 (11th Cir. 1990) (word "otherwise" in the phrase "represented by counsel or otherwise" refers to representation that was "in a manner similar to that of counsel").

Likewise, here, the "otherwise" clause, read in context, includes only those offenses similar to

burglary, arson, extortion, and use of explosives in that they are violent, active property offenses typical of career criminals that are more dangerous when committed with firearms.

B. Canons of statutory construction establish the "otherwise" clause offenses must be similar to the enumerated offenses.

The doctrines of *noscitur a sociis* and *ejusdem generis* confirm Mr. Begay's argument that the "otherwise" clause includes only those offenses similar to the preceding enumerated offenses. The government erroneously asserts these doctrines have no place in the interpretative analysis because the "otherwise" clause identifies the "single relevant characteristic" the "otherwise" clause offenses and the enumerated offenses have in common—serious potential risk of physical injury. Resp. Br. 26-27. The object of the doctrines is to restrict the meaning of general words in light of the surrounding specific words, "to carry out the legislative intention," *Reiche v. Smythe*, 80 U.S. 162, 164 (1871), by "avoid[ing] giving unintended breadth to the Acts of Congress," *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). In this case, the doctrines restrict the meaning of "presents a serious potential risk of physical injury to another," in light of the enumerated offenses, to avoid giving the general phrase the unintended breadth the government seeks. Congress's listing of particular offenses before the broadly worded "otherwise" clause evinces an intent to limit the reach of that clause to offenses similar to the enumerated offenses in that they are violent, active property offenses typical of career criminals that are more dangerous when committed with firearms.

In support of its mistaken view of *noscitur a sociis* and *ejusdem generis*, the government misreads *James*. The government claims this Court in *James* held that imposing any limitations on the "otherwise" clause "would unduly narrow" the "expansive phrasing" of that clause. Resp. Br. 27 (quoting *James*, 127 S. Ct. at 1592). This Court did no such thing. This Court held only that the supposed completed nature of the enumerated offenses did not restrict the meaning of the "otherwise" clause. *James*, 127 S. Ct. at 1592-93. It did not hold the only attribute the "otherwise" clause and the enumerated offenses share is the significant risk of injury.

In *James*, this Court addressed whether the "otherwise" clause included attempted burglary, an offense that is an obvious analog to an enumerated offense. Attempted burglary shares all the attributes of the enumerated offenses that Mr. Begay contends the "otherwise" clause offenses also share. Attempted burglary is a violent, active property offense typical of career criminals that is more dangerous when committed with a firearm. This Court had no occasion to address whether the "otherwise" clause includes only offenses that fit that description.

The government does not deny that the enumerated offenses are violent, active property offenses. The government does assert the enumerated offenses of arson and use of explosives are not ordinarily committed as a means of livelihood. Resp. Br. 32-33. The government misses Mr. Begay's point. This Court indicated in *Taylor* that all the enumerated offenses, and the offenses the "otherwise" clause covers, are offenses that are typically committed by career criminals "as their means of livelihood." 495 U.S. at 587. While not everyone commits arson or

uses explosives to pursue a livelihood, the career criminals Congress targeted in § 924(e)(2)(B)(ii) typically commit those offenses. *Id.*

The government correctly observes that not all offenses included within § 924(e)(2)(B)(i)—the use-of-force subsection of § 924(e)(2)(B)—are typically committed as a means of livelihood. Resp. Br. 32. But, subsection (ii) of § 924(e)(2)(B), at issue here, is the provision Congress specifically directed at career offenders who commit property offenses as their means of livelihood, as this Court's discussion of the legislative history of subsection (ii) demonstrates. *Taylor*, 495 U.S. at 582-88. Thus, subsection (i) does not affect the career-criminal nature of subsection (ii).

The government also mistakenly claims that neither arson nor the use of explosives is more dangerous than any other offense when committed with a firearm. Resp. Br. 33. The government is wrong for the same reason this Court in *Taylor* explained that burglary is a dangerous offense. A burglary "creates the possibility of a violent confrontation between the offender," and a third party and the offender's "awareness of this possibility may mean he is prepared to use violence." 495 U.S. at 588. So also, in the ordinary case, an arsonist or user of explosives, by entering or going near the property he wishes to destroy, creates the possibility of a violent confrontation and is aware of the possibility that violence may be necessary. This makes arson and use of explosives more dangerous when committed with a firearm.

By contrast, a DWI offender does not court confrontation in that way and is not aware of the possibility of such a confrontation. In touting DWI's dangers, the government points only to the risks of

deaths and injuries caused by motor vehicle accidents, not to the risks of confrontation. Resp. Br. 16-20. Both Judges McConnell and Hartz recognized drunk driving is not more dangerous when firearms are involved. JA 94, 110. *See also McCall*, 439 F.3d at 983 (Lay, J., joined by Wollman and Bye, JJ., dissenting) (drunk driver's threat to society "is not intensified by gun possession").

The *ejusdem generis* and *noscitur a sociis* principles apply to the "otherwise" clause. They limit the scope of that clause to crimes that share several attributes with the enumerated offenses. Considering the entire context surrounding the clause, the "otherwise" clause includes only violent, active property offenses typical of career criminals that are more dangerous when committed with firearms.

C. The legislative history supports the "similar crimes" interpretation.

A review of the legislative history of § 924(e)(2)(B)(ii) strongly bolsters Mr. Begay's interpretation. The government's arguments to the contrary distort that history.

1. The government mistakenly relies on Congress's addition of the enumerated offenses to one proposed version of 924(e)(2)(B)(ii), which included only: "involves conduct that presents a serious potential risk of physical injury to another." Resp. Br. 37-38; *see Taylor*, 495 U.S. at 586 (quoting H. R. 4885). The government claims that sequence indicates Congress intended only to ensure the enumerated offenses were counted as "violent felonies." Resp. Br. 38. First, the sequence could easily warrant the opposite conclusion: Congress added the enumerated offenses to ensure a narrow reading of the provision. Congress members differed over how broad or narrow

the ACCA should be, and House Report No. 99-849 described the original clause as including the enumerated offenses and "similar" property crimes. *Taylor*, 495 U.S. at 583, 587 (quoting H. R. Rep. No. 99-849, at 3 (1986)).

Second, the enumerated crimes were not added to an already-enacted version of the ACCA. Resp. Br. 39. Congress was amending the 1984 version. That version explicitly applied only to robbery and burglary. *Taylor*, 495 U.S. at 581. The congressional discussions concerned how far to expand the ACCA enhancement to other offenses. Thus, as Judge McConnell pointed out, JA 114, enumerated offenses were the "statutory foundation on which the congressional deliberations were based."

Third, the government's explanation for adding the enumerated offenses—to ensure those offenses were covered, Resp. Br. 38—does not make sense in light of the simultaneous addition of the word "otherwise." A simple "or" alone would have served the government's proffered purpose. JA 110-11 (McConnell, J., dissenting); *McCall*, 439 F.3d at 977 (Lay, J., joined by Wollman and Bye, JJ., dissenting).

2. The legislative history, properly assessed, establishes Congress intended to limit the "otherwise" clause to property crimes similar to those enumerated. The government claims House Report No. 99-849 did not indicate Congress's belief that the "otherwise" clause would be so limited. Resp. Br. 39. The words of the report belie that claim.

The report observed that a major question involved in the hearings was "what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony." *Taylor*, 495 U.S. at 587 (quoting H. R. Rep. No. 99-849, at 3) (emphasis in

original). Significantly, the report italicized the word "property." The report went on to state that the "serious potential risk" phrase "will add State and Federal crimes against *property* such as burglary, arson, extortion, use of explosives and *similar* crimes as predicate offenses." *Id.* (emphases added). The report's section-by-section analysis confirmed this analysis. *United States v. Parson*, 955 F.2d 858, 869 (3d Cir. 1992) (quoting H. R. Rep. No. 99-849, at 4-5). The report expresses congressional intent to restrict the "otherwise" clause to property offenses similar to the enumerated offenses.

D. The government misreads *James*.

The government overstates the holding in *James*. It declares this Court determined that a felony offense qualifies as a "violent felony" under the "otherwise" clause "[a]s long as [the] offense is of a type that, by its nature, presents a serious potential risk of injury to another." Resp. Br. 14 (quoting *James*, 127 S. Ct. at 1597). The government takes the quote out of context. The quoted phrase concluded this Court's explanation that, in making the risk determination under the "otherwise" clause, the proper inquiry concerns conduct in the ordinary case, rather than in its most innocuous form. *Id.* The quote upon which the government relies simply summarized this Court's ordinary-case holding. *Id.* This Court took no position on the limits on the kinds of unenumerated offenses the "otherwise" clause covers.

Similarly, the government misunderstands this Court's statement in *James* that Congress "did not intend the . . . enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others . . . ." Resp. Br. 15 (quoting *James*, 127 S. Ct. at 1593). The

James Court's reference to "types" of crimes referred to the question before this Court at the time—the completed nature of the offenses—rather than to any other aspect of the enumerated offenses not before this Court.

The government's attempt to use that reference more broadly is thwarted by this Court's subsequent discussion in *James*. This Court compared the risk of physical injury associated with Florida attempted burglary to the same kind of risk associated with the enumerated offense of burglary to ascertain whether the "otherwise" clause covered the Florida offense. *James*, 127 S. Ct. at 1594-96. Thus, this Court recognized the listed offenses play a more significant role than the government accords to them. This Court certainly did not say that any felony of whatever type that "presents a serious risk of physical injury to another" is a "violent felony." Rather, this Court indicated the enumerated offenses illuminate the meaning of the residual clause.

E. Recidivist DWI, as defined under New Mexico law, is not a violent, active property crime typical of career criminals that becomes more dangerous when committed with a firearm.

The "otherwise" clause of § 924(e)(2)(B)(ii) does not encompass the traffic offense of DWI, as defined under New Mexico law. That offense is not a violent, active property offense typically committed by career criminals that is more dangerous when committed with a firearm. Since DWI does not fit any of the criteria for inclusion under the "otherwise" clause, it is not a "violent felony." Even assuming arguendo that this Court adopts only one of Mr. Begay's suggested "otherwise" clause criteria, Mr. Begay's DWI convictions do not qualify as convictions for

"violent felonies." Therefore, the ACCA does not apply to Mr. Begay.

II. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" BECAUSE IT HAS NO *MENS REA* ELEMENT.

The context of the "otherwise" clause, in particular the term the "otherwise" clause defines—"violent felony"—and the purpose of 18 U.S.C. § 924(e)(2)(B)(ii) to deter career criminals who prey on the community, strongly connote a focus on those who engage in deliberate conduct. The canons of *noscitur a sociis* and *ejusdem generis* establish there must be similarities between the "otherwise" clause offenses and the preceding enumerated offenses, each of which indisputably has a *mens rea* element. The harshness of the ACCA enhancement triggers the presumption of a *mens rea* requirement. For these reasons, the "otherwise" clause includes only offenses with *mens rea* elements, which New Mexico DWI does not have.

1. The government is wrong when it asserts, without citation to authority, that the presumption of a *mens rea* requirement is inapplicable to sentence enhancements. Resp. Br. 34-35. While the *mens rea* presumption is usually applied to statutes defining criminal offenses, there is "little doubt that it should also be applied to legal norms that define aggravating circumstances for purposes of sentencing." *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir.) (internal quotations omitted), *on reconsideration*, 463 F.3d 1 (2006).

> Like the rule of lenity—which [this Court] has stated on several occasions applies not only 'to

> interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose,' *Bifulco v. United States*, 447 U.S. 381, 387, (1980)—the presumption against strict liability is founded on the principle that laws that deprive an individual of his liberty should be strictly construed. Laws that enhance the sentence of a criminal defendant meet this description.

Id.

2. The government posits that the knowing nature of drinking alcohol plus the recklessness of driving drunk suffice to constitute *mens rea*. Resp. Br. 35. That argument contradicts New Mexico law, which makes DWI a strict-liability offense. *State v. Rios*, 980 P.2d 1068, 1070 (N.M. Ct. App. 1999). That the act of DWI might supply evidence of a state of mind does not create a scienter element. The categorical approach requires assessment solely of the elements of the offense in question. *See James*, 127 S. Ct. at 1597. New Mexico DWI contains no *mens rea* element, not even the intent to drive. *Rios*, 980 P.2d at 1070. The "otherwise" clause therefore does not include New Mexico DWI.

III. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" BECAUSE, BASED SOLELY ON ITS ELEMENTS, IT IS NOT "PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR."

The "otherwise" clause does not include recidivist DWI, as defined under New Mexico law, because the elements of that offense are not "punishable by imprisonment for a term exceeding one year" under

18 U.S.C. § 924(e)(2)(B). The definition of "violent felony" focuses on the offense, not on the offender. The government has failed to demonstrate to the contrary. The seriousness of the offense for ACCA purposes depends on the elements. The elements of New Mexico recidivist DWI call for a sentence of less than a year.[1] *State v. Anaya*, 933 P.2d 223, 228 (N.M. 1996); N.M. Stat. Ann. § 66-8-102(E).

This Court should consider this argument, although Mr. Begay did not raise it before the Tenth Circuit. This Court has jurisdiction to consider issues not presented below. *Carlson v. Green*, 446 U.S. 14, 17, n. 2 (1980). The government acknowledges Mr. Begay's certiorari question includes the issue under this point, and apparently does not oppose addressing that issue. Resp. Br. 44-45.

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[1] The government asserts the issue in *United States v. Rodriguez*, No. 06-1646, is "identical in substance" to the one Mr. Begay raises here. Resp. Br. 45. Two distinctions exist between Mr. Begay's case and Mr. Rodriguez's. First, on pages 16-17 of its *Rodriguez* brief, the government argues the phrase "a maximum" in § 924(e)(2)(A)(ii), rather than "the maximum," indicates the ACCA contemplates alternative statutory maximums. The relevant phrase applicable to this case is "any crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(2)(B). That phrase does not lend itself to alternative maximums and highlights the focus of § 924(e)(2)(B) on the offense.

Second, in New Mexico, a DWI punishable as a felony, unlike all non-DWI felonies, cannot be used to increase a sentence under the state's habitual offender statute. *State v. Begay*, 17 P.3d 434, 435-437 (N.M. 2001). It would be problematic to impose on Mr. Begay the drastic enhancement the ACCA requires based on a conviction New Mexico does not deem serious enough to warrant an enhancement under its habitual offender law.

Because Mr. Begay's DWI convictions were not for crimes "punishable by imprisonment for a term exceeding one year," the ACCA does not apply to Mr. Begay.

IV. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" BECAUSE IT DOES NOT INVOLVE CONDUCT THAT PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO ANOTHER.

Assuming arguendo that the "otherwise" clause includes all crimes that present a serious potential risk of physical injury to another, the government has not met its burden to prove the clause encompasses recidivist DWI in New Mexico. The government improperly extends its analysis beyond the elements of DWI in New Mexico and focuses on the cumulative impact of DWI, while ignoring the critical question—the degree of risk associated with an individual DWI episode.

1. Assuming arguendo that the "all crimes" interpretation applies to the "otherwise" clause, the proper inquiry to determine whether that clause includes an offense "is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of [physical] injury to another." *James*, 127 S. Ct. at 1597. The entire focus is on the elements of the offense, not the specific conduct involved. *Id.* at 1594. The government disregards that precept throughout its attempt to show DWI meets the requisite risk standard.

The government points out that to be guilty of DWI in New Mexico the offender must be impaired. Resp.

Br. 21-22. Impairment, however, is insufficient to establish DWI creates a risk of injury. The government asserts the impairment "is generally proved by behavioral evidence, such as erratic driving, failed sobriety tests, and slurred speech." Resp. Br. 22. But, the failing of a sobriety test and slurred speech do not create any danger. Certainly, erratic driving could create such a danger, but neither such driving nor the violation of a traffic code is an element of a New Mexico DWI. Thus, this Court may not consider such circumstances in assessing the dangerousness of that offense. *James*, 127 S. Ct. at 1597. The "conduct encompassed by the elements of the offense," *id.* at 1597, does not present any danger.

The government dismisses the fact that DWI can be committed while parked on private property, *see State v. Johnson*, 15 P.3d 1233, 1235-38, 1240 (N.M. 2000), by contending DWI presents a danger in the ordinary case. Resp. Br. 23-24. First, it is far from clear the ordinary DWI is not parking and roadblock DWI, where no evidence exists of dangerous driving. *See Johnson*, 15 P.3d at 1235-38.; *State v. Sanchez*, 36 P.3d 446, 448, 450-51 (N.M. Ct. App. 2001). Second, and more importantly, any dangerous driving is not "conduct encompassed by the elements of" DWI. *See James*, 127 S. Ct. at 1597.

By contrast, when an offender commits attempted burglary in Florida, in the ordinary case, no further conduct on the offender's part is necessary to present the requisite risk of injury. *Id.* at 1594-96. In New Mexico, conduct satisfying the elements of DWI does not present the required risk, absent additional conduct. For that reason, among others, the government's statistics, Resp. Br. 17-18, are irrelevant. They measure, at best, the consequences

of conduct that goes beyond conduct encompassed by the elements of DWI in New Mexico.

2. The government proceeds on the incorrect assumption that the cumulative impact of DWI episodes matters. Resp. Br. 17-19. The serious-potential-risk question turns on the dangerousness of a single violation, not the consequences of all the violations throughout the country. When this Court assessed the risk of attempted burglary in *James*, it evaluated the risks involved with respect to a typical discrete case of attempted burglary, not the effect of all the attempted burglaries in the United States. 127 S. Ct. at 1594-96. The government's statistical argument is inapposite.

Also inapposite is the government's reliance on the purported increased danger recidivist DWI offenders create when they re-offend. Resp. Br. 17-18, 19 & n. 13. Under New Mexico law, a driver's recidivism is not an element of the offense. *Anaya*, 933 P.2d at 228-29. It is therefore irrelevant. *See James*, 127 S. Ct. at 1594, 1597.

Moreover, the statistics and authorities the government cites in order to show the extra-dangerousness of recidivists are of no value. First, the government grossly misstates the percentage of recidivists who were drivers with a blood alcohol concentration of .08 or more and involved in alcohol-related fatalities in 2006. According to the table to which the government cites, the actual percentage is seven, not eighty, as the government states. Resp. Br. 17; NHTSA, *Traffic Safety Facts* tbl 10 (Aug. 2007) *available at* http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/RNotes/2007/810821.pdf (last visited Dec. 26, 2007). Second, even that figure overestimates the

risk "to another," since drunk drivers are more likely to kill themselves than someone else. National Association of Criminal Defense Lawyers Brief ("NACDL Br.") 11. Third, the government cites its own Department of Justice publication for the proposition that repeat offenders are disproportionately responsible for alcohol-related crashes, without explaining what that disproportion supposedly is or on what evidence the proposition is based. Resp. Br. 18 & n. 9 (citing Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Drunk Driving, Problem-Oriented Guides for Police, Problem-Specific Guides Series* No. 36 at 4 (Feb. 2006) *available at* http://www.cops.usdoj.gov/mime/open.pdf?Item=1665 (last visited Dec. 26, 2007)). Fourth, the government claims a recidivist is far more likely to drive with high blood alcohol content, and is therefore far more likely to cause a fatal accident. But, that claim does not appear in the publication the government cites. *Id.*

On the other hand, amicus NACDL submitted an affidavit from Dr. Paul Zador that reliably assesses the risk of physical injury to another associated with a single drunk driving episode—the relevant issue. Based on an evaluation of accepted sources, while erring on the side of overestimation, Dr. Zador's study indicated one in every 386 DWI episodes, and one in every 3395 episodes of driving within two hours of drinking, resulted in an injury to someone other than the impaired driver. NACDL Br. 9 & attach. 18-19. Thus, there is a very low probability a particular impaired-driving episode would result in physical injury to another.

3. The government mistakenly relies on the Sentencing Commission's inaction with respect to the inclusion of DWI as a "crime of violence" under the

career offender guidelines. Resp. Br. 20-21. The Commission only exercises its authority, as noted in *Braxton v. United States*, 500 U.S. 344, 348 (1991), to revise the Guidelines in response to circuit court decisions when necessary to resolve circuit splits. 65 Fed. Reg. 50034-03, 50037 (Aug. 16, 2000). As the government observes, the circuit courts were not split on whether DWI was a "crime of violence." Resp. Br. 20. Notably, the Commission has not explicitly listed DWI as a crime that presents a serious potential risk of injury, despite the long list of "crimes of violence" the Commission has specified in addition to those enumerated in the guideline itself. USSG § 4B1.2(a)(2) & cmt. (n. 1). The government points to no evidence the Commission has conducted any empirical analysis of DWI risks. The Commission's silence says nothing on that subject. *See Brown*, 513 U.S. at 121 (congressional silence "lacks persuasive significance") (quotations omitted).

4. The government has not met its burden to prove New Mexico DWI presents a serious potential risk of physical injury to another under the "otherwise" clause.

V. THE CONSTITUTIONAL AVOIDANCE DOCTRINE AND THE RULE OF LENITY PROHIBIT INCLUSION OF RECIDIVIST DWI, AS DEFINED UNDER NEW MEXICO LAW, IN THE ACCA'S "OTHERWISE" CLAUSE.

The constitutional avoidance doctrine and the rule of lenity require resolving the interpretation of the "otherwise" clause in Mr. Begay's favor. The government's arguments to the contrary are unpersuasive.

A. The constitutional avoidance doctrine prohibits inclusion of recidivist DWI, as defined under New Mexico law, in the ACCA's "otherwise" clause.

1. The government misunderstands the vagueness problem to be avoided in this case. The problem is not that it is merely harder to apply the "all crimes" interpretation with respect to crimes that are not analogous to the enumerated crimes, Resp. Br. 40-41, but rather that that interpretation fosters confusion and requires guesswork. On the other hand, the "similar crimes" interpretation provides clear guidance because it is grounded in a comparison to the enumerated offenses. Without that connection to the enumerated offenses, the "all crimes" interpretation fails to give fair warning and invites arbitrary enforcement, rendering it unconstitutionally vague. *See* National Association of Federal Defenders Brief ("NAFD Br.") 9-12, 25-26.

2. The government contests Mr. Begay's separation-of-powers point by noting statutory and judicial standards that require risk determinations. Resp. Br. 41-43. But, unlike the serious-potential-risk determination the "all crimes" interpretation necessitates, those risk determinations are made in the context of an adversarial proceeding in light of specific facts presented with respect to particular incidents. Under the "all crimes" interpretation, a court must assess risks on a categorical basis without any evidence, requiring, in practice, resort to hypotheticals and speculation. The court then decides as a policy matter whether the degree of risk is serious enough to warrant the drastic ACCA enhancement. That process calls for "an essentially legislative judgment." *United States v. Thomas*, 159

F.3d 296, 299-300 (7th Cir. 1998); *see also* NAFD Br. 19-24, 27.

3. The government offers no response to Mr. Begay's Fifth and Sixth Amendment arguments, other than to say that the serious-potential-risk question under the "all crimes" interpretation is a legal question. Resp. Br. 43. While the "all crimes" approach does not require an investigation into the particular circumstances of a defendant's prior convictions, as the government notes, Resp. Br. 43, it does require an inquiry into the facts of an entire category of offenses. A court must discern what level of risk of what physical injuries is associated with the commission of an offense in the ordinary case. That type of fact finding goes well beyond "the conclusive significance of a prior judicial record" and is thus subject to due process and Sixth Amendment requirements. *See Shepard v. United States*, 544 U.S. 13, 25 (2005) (plurality opinion); *see also* NAFD Br. 13-19, 26-27.

B. The rule of lenity prohibits inclusion of recidivist DWI, as defined under New Mexico law, in the ACCA's "otherwise" clause.

This Court has made clear the rule of lenity applies to penalty provisions. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). Without citation to any authority, and there appears to be none, the government claims rule-of-lenity concerns are less compelling when applied to a sentencing provision that does not regulate primary conduct. Resp. Br. 44. The government makes an invalid distinction. The purposes the rule of lenity serves—fair notice, separation of powers, and uniformity of interpretation—are not any less significant in the context of a predicate-conviction, sentencing statute.

The rule of lenity applies with full force to the ACCA. This Court must resolve any doubt in Mr. Begay's favor. *See Leocal*, 543 U.S. at 11-12 & n. 8.

If necessary, application of the constitutional avoidance doctrine and the rule of lenity precludes inclusion of New Mexico recidivist DWI in the "otherwise" clause. The ACCA does not apply to Mr. Begay.

CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the Tenth Circuit's judgment affirming application of the ACCA to Mr. Begay.

Respectfully submitted,

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